Filed 4/25/19 In re J.S. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re J.S., a Person Coming Under the Juvenile Court Law.	B292430 (Los Angeles County Super. Ct. No. 18CCJP01292A)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. STERLING S., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Kristen Byrdsong, Commissioner. Affirmed.

Richard L. Knight, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Jessica S. Mitchell, Deputy County Counsel, for Plaintiff and Respondent, Los Angeles County Department of Children and Family Services.

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The juvenile court exerted dependency jurisdiction over a 17-year-old girl after hearing evidence that her father "whooped" her with a belt and an electrical cord. In this appeal, father challenges this jurisdiction as unsupported by substantial evidence. He also argues that the juvenile court violated the Indian Child Welfare Act (25 U.S.C. § 1901 et seq. (ICWA)). We conclude there was no error, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Sterling S. (father) is the father of J.S., who will turn 18 this November.

Father and J.S. have had a contentious relationship. While J.S. was in her first two years of high school, father "hit [her] anywhere and everywhere" with a belt and an electrical cord "multiple times." During J.S.'s third year of high school, father switched to hitting her with his hand. The electrical cord left small scars on J.S.'s upper arms.

In late February 2018, a "concerned citizen" brought J.S. into a police station because J.S. was wandering down the street and claimed to be locked out of her apartment after her family did not pick her up from school.

II. Procedural History

A few days after J.S. was taken to the police and reported the prior physical abuse, the Los Angeles County Department of Children and Family Services (the Department) filed a petition

asking the juvenile court to exert dependency jurisdiction over J.S. on the ground that father's "physical[] abuse[]" of J.S. by "striking [her] arms with a belt and extension cord" put her at "substantial risk" of suffering "serious physical harm" (1) "inflicted nonaccidentally" (rendering dependency jurisdiction appropriate under Welfare and Institutions Code section 300, subdivision (a)),[1] and (2) "as a result of the failure or inability of" father to adequately "supervise or protect" her (rendering dependency jurisdiction appropriate under section 300, subdivision (b)(1)).

At the Department's request, the juvenile court initially detained J.S. from her father and placed her in foster care pending the hearing on whether to exert dependency jurisdiction. It took the Department several months to conduct "due diligence" on J.S.'s biological mother. During that time, the Department's view on the necessity of placing J.S. outside of father's home changed. In the Department's April 2018 report to the court, the Department recommended that J.S. be returned to her father's home after the jurisdictional hearing. And after J.S. absconded from her foster home and returned to her father's home in July 2018, the Department—and then the juvenile court—allowed her to remain with her father pending the jurisdictional hearing on an "extended visit" monitored by J.S.'s stepmother.

The juvenile court conducted its jurisdictional and disposition hearing on August 29, 2018. At that hearing, the court exerted dependency jurisdiction over J.S. based on the allegation that J.S. faced a substantial risk of serious physical harm as a result of her father's inability to adequately supervise

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

or protect her (that is, the section 300, subdivision (b)(1) count), but dismissed the other count. The court ordered that J.S. remain in her father's home and that father be offered family maintenance services.[2]

Father filed a timely notice of appeal.

DISCUSSION

I. Sufficiency of Evidence Supporting Jurisdiction

Father argues that the juvenile court erred in exerting dependency jurisdiction over J.S. because there is insufficient evidence that, by the time of the hearing, she was at substantial risk of suffering serious physical harm. We review this claim for substantial evidence. (*In re R.T.* (2017) 3 Cal.5th 622, 633.) In conducting this review, we "consider[] the evidence in the light most favorable" to the court's order, and draw all inferences and resolve all evidentiary conflicts "in support of the order." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.)

Applying this standard, there was sufficient evidence to support the juvenile court's exertion of dependency jurisdiction over J.S. under section 300, subdivision (b)(1). To sustain jurisdiction under this subdivision, the Department must establish that a child "has suffered, or there is a substantial risk that [she] will suffer, serious physical harm . . ., as a result of the failure or inability of . . . her parent . . . to adequately supervise or protect" her. (§ 300, subd. (b)(1); *In re Rocco M.* (1991) 1 Cal.App.4th 814, 820 [breaking section 300, subdivision (b) into elements of "neglectful conduct," causation and risk of harm].)

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[2] The juvenile court set a progress report hearing for February 26, 2019, and at that hearing set a further hearing for May 28, 2019, at which the court anticipated terminating jurisdiction.

J.S. reported that father had repeatedly beat her with a belt and electrical cord, and she had the scars to prove it. Father denied ever using an electrical cord, but admitted to "spank[ing] her with a belt because [he] was frustrated." Father's prior abuse, coupled with his refusal to acknowledge the full extent of that abuse, constitutes substantial evidence of a substantial risk that the volatile relationship between the two might again erupt into violence causing J.S. "serious physical harm." (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1383-1384 [""[P]ast conduct may be probative of current conditions" if there is reason to believe that the conduct will continue.""]; *In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1044 ["denial is a factor often relevant to determining whether persons are likely to modify their behavior in the future without court supervision"].)

Father resists this conclusion with three arguments.

First, he contends that there was insufficient evidence that J.S. was ever subjected to unlawful physical harm in the first place. With respect to injuries inflicted with an electrical cord, father asserts that J.S.'s older brother and stepmother provided alternate explanations for the scars on J.S.'s arms (namely, that she got them playing softball or from picking at scabs), that J.S. did not report the scars contemporaneously with their infliction, and that there was "[n]o corroborating evidence that those scars were caused by" father. These assertions ignore the standard of review requiring us to construe the record in the light that supports the juvenile court's findings; they also ignore that "[t]he testimony of a single witness can provide substantial evidence." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1101.) With respect to the injuries inflicted with a belt, father posits that he was merely exercising his parental right to

discipline J.S. Although parents possess "'a right to reasonably discipline'" their child and to "'administer reasonable punishment'" (*Gonzalez v. Santa Clara County Dept. of Social Services* (2014) 223 Cal.App.4th 72, 86), whether a parent acts within or without the bounds of this right when inflicting corporal punishment turns on "(1) whether the parent's conduct is genuinely disciplinary; (2) whether the punishment is 'necess[ary]' (that is, whether the discipline was 'warranted by the circumstances'); and (3) 'whether the amount of punishment was reasonable or excessive.' [Citation.]" (*In re D.M.* (2015) 242 Cal.App.4th 634, 641.) Substantial evidence supports the juvenile court's finding that father's act of "whoop[ing]" J.S. while he was "frustrated" did not constitute reasonable discipline. More generally, father urges that the court erred in relying on the prior, unsubstantiated child welfare referrals and on the Department's view that father's "authoritarian parenting style" contributed to the risk. However, the court did not expressly rely on either consideration in finding jurisdiction, for the other reasons explained above, substantial evidence exists without those considerations.

Second, father argues that J.S. eventually told the Department that she was not "afraid" of father and that J.S. is "physically capable of defending herself." A child's ability and willingness to respond to violence with more violence does not, in our view, negate the substantial risk of serious physical harm posed by father. Indeed, it only elevates that risk.

Third, father cites the Department's eventual position that J.S. "may safely return to" father's home because, in its view, there was no "current risk" warranting continuing detention from father. These citations conflate the issues of *removal* and

jurisdiction. A child's removal from her parent's home is only warranted if the Department can show, by clear and convincing evidence and as pertinent here, that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home." (§ 361, subd. (c)(1).) Jurisdiction under subdivision (b)(1) of section 300, however, may as noted above be exerted if the parent's "failure or inability" to "adequately supervise or protect" a child puts her at "substantial risk" of "serious physical harm." (§§ 300, subd. (b)(1), 355, subd. (a).) These are different standards, and the Department's statements pertained only to removal. Nothing in the Department's views about the propriety of removal calls into question the sufficiency of the evidence underlying the court's jurisdictional finding.

II. Compliance with ICWA

Father contends that the juvenile court did not comply with ICWA. Where the facts are undisputed, we review this claim de novo (*Guardianship of D.W.* (2013) 221 Cal.App.4th 242, 250); where they are disputed, we review the juvenile court's ICWA findings for substantial evidence (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430).

ICWA was enacted to curtail "the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement." (*Miss. Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32.) Given this focus, ICWA only applies "when child welfare authorities seek permanent foster care or termination of parental rights [leading to adoption]." (*In re M.R.* (2017) 7 Cal.App.5th 886; *In re Alexis H.* (2005) 132 Cal.App.4th 11, 14; 25 U.S.C. § 1912, subd. (a) [ICWA applies to an "involuntary proceeding" where the state is

"seeking the foster care placement of, or termination of parental rights to, an Indian child"].) ICWA does not apply where those authorities seek to place the child with either of the child's parents, whether they be the custodial or non-custodial parent. (*In re M.R.*, at p. 904; *In re J.B.* (2009) 178 Cal.App.4th 751, 758 ["Placement with a parent is *not* foster care" triggering ICWA].)

ICWA does not apply in this case because the Department sought to place J.S. with father.[3] Citing *In re Jennifer A.* (2002) 103 Cal.App.4th 692 (*Jennifer A.*), father contends that ICWA still applies because the Department *initially* asked the court to detain J.S. from father. To be sure, *Jennifer A.* held that ICWA still applies when the Department puts the issue of a child's placement into foster care before the juvenile court—even if the juvenile court ultimately decides to place the child with his or her parent. (*Id.* at p. 700.) But here, the Department abandoned its initial position seeking to detain and remove J.S. from father and, by the time of the jurisdictional and dispositional hearing, unequivocally recommended that J.S. remain with father. Where, as here, the Department has changed its position and no longer seeks a ruling that could place a child in foster care or up for adoption, ICWA does not apply. (*In re M.R.*, *supra*, 7 Cal.App.5th at p. 904 [so holding].)

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[3] In light of this conclusion, we have no occasion to delve into the facts regarding what father reported regarding Indian heritage or the steps the Department took to investigate those reports and then notify the pertinent tribes regarding J.S.

DISPOSITION

The orders are affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P.J.
LUI

_____, J.
CHAVEZ